In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. . . .

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

JURISDICTIONAL STATEMENT
In Support of Appeal From the Supreme Court of Ohio.

OPINIONS IN THE COURTS BELOW.

Neither the Supreme Court of Ohio nor the Court of Appeals for the Eighth Judicial District of Ohio issued an opinion. A copy of the Journal Entry filed in each court is set forth in Appendix, p. 17.

The opinion of the Court of Common Pleas of Cuyahoga County, Ohio has not been published. A copy of this opinion is set forth in Appendix, p. 15.

JURISDICTION.

The appellant asks that this appeal be granted to review the judgment of the Ohio Supreme Court dismissing appellant's appeal entered on October 23, 1968. Appellant claims that his rights were violated contrary to the First and Fourteenth Amendments to the Constitution of the United States. Notice of appeal was filed with the Ohio Supreme Court on January 5, 1969.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1257 and 2101. The Court's jurisdiction is sustained by *Williams v. Rhodes*, U.S. , 21 L. ed. 2d 24 (October 15, 1968).

QUESTIONS PRESENTED.

1. In view of the holding of this Court in *Williams v. Rhodes*, U.S. , 21 L. ed. 2d 24 (October 15, 1968) which invalidated those Ohio Election Laws which operated to exclude third parties and independent candidates from Ohio's election process, is not the seven percent statute attacked here void as unconstitutional?

2. Where the participation of independent candidates in a state's electoral process is neither substantial nor disruptive under a statute requiring independent candidates to file nominating petitions containing signatures equal in number to *one* percent of those who last voted for governor in the district, can a State constitutionally revoke the one percent statute and impose in its stead a *seven* percent requirement?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

Amendment I:

> Congress shall make no law * * * abridging the freedom of speech * * *

Amendment XIV:

> * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code.

Section 3513.257:

> The nominating petition of an independent candidate for the office of senator of the general assembly, and district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district. The nominating petition of independent candidates for the office of judge of the court of appeals shall be signed by qualified electors not less in number than seven per cent of the number of electors who voted for governor at the next preceding regular state election in the territory over which such court has jurisdiction, or twenty-five hundred electors, whichever is the lesser number.
>
> No such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section. If the district consists of more than one county, such petition shall contain the signa-

tures of at least fifty electors from each of at least one-half of the several counties of such district. Such petition shall be filed with the board of elections of that county or part of a county within the district which had a population greater than that of any other county or part of a county within the district according to the last federal decennial census, not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

STATEMENT OF THE CASE.

Appellant was an independent candidate for the United States House of Representatives from the Twenty-First Congressional District of Ohio in the November, 1968, election. To obtain a place on the Ohio ballot he filed nominating petitions proper in all respects save one; his petitions did not contain the number of signatures required by Section 3513.257, Ohio Revised Code. That statute requires an independent candidate for Congress to file signatures equal in number to seven percent of the votes cast for governor in the Congressional District in the last gubernatorial election. In appellant's case this was 5,974 signatures.[1]

Appellant submitted 899 valid signatures. This would have been sufficient under the previous Ohio law which had been in effect for *over 70 years* and which required independent candidates to file *one* percent in order to qualify for the ballot. (See Section 4785-91, Ohio General Code before amendment in 1952.) In the decade previous to 1952, only a tiny number of candidates ran for Congress

[1] In Ohio's 23rd Congressional District the requirement in 1968 was 5,281 for an independent candidate. By contrast, party candidates qualify for the primary by filing only 100 signatures. Section 3513.05, Ohio Revised Code.

as independents. The figures on a state scale are as follows:

Year	Number of Independent Candidates for Congress
1940	1
1942	2
1944	1
1946	2
1948	1
1950	2

Thus, out of some 150 Ohio Congressional races in this period, there were but 9 independent candidacies and never more than one in any Congressional District. Since 1956, there has been but one independent candidate for Congress on the ballot in Ohio.

After the Board of Elections of Cuyahoga County refused his petitions, Appellant filed suit for a writ of mandamus in the Court of Common Pleas of Cuyahoga County, Ohio. He asked the court to hold Section 3513.257 Ohio Revised Code unconstitutional and void. In his initial pleading he alleged in part:

> "15. Relator says that unless he is duly certified an independent candidate for (sic) United States House of Representatives from the Ohio Twenty-First Congressional District, his fundamental constitutional rights will be abridged, to wit:
>
> b. His right to Equal Protection of the Laws guaranteed by Amendment XIV of the United States

The figures are taken from Ohio Election Statistics, a document issued by the Ohio Secretary of State. The contents of the publication are subject to judicial notice; see Mack v. Board of Elections, 111 Ohio St. 203, 145 N.E. 28, 30 (1924). The statistics quoted above, whose accuracy has never been disputed, were brought to the attention of the trial court and the Court of Appeals.

stitution, a right abridged by the seven percent requirement for independent candidates set forth in [illegible] of the Ohio Revised Code.

c. His right to Due Process of Law guaranteed by [illegible] of the United States Constitution is violated by the imposition of restrictive and repressive election regulations designed to prevent independent candidates from seeking political office in [illegible] and designed to disfranchise independent voters [illegible] are unwilling to vote for the party candidates.

d. His right to free speech as a duly qualified political candidate for office guaranteed by Amendment [illegible] the United States Constitution."

[illegible] court on the merits and at its conclusion [illegible] Common Pleas defined the issues as follows:

"[illegible] question in the Court's mind, I don't [illegible] as far as the evidence is concerned, that the [illegible] Paul W. Brockington is qualified as far as the [illegible] goes for holding such an office. The [illegible] primarily is one whether the legislative pro[illegible] in the seven per cent is properly within the police [illegible] of the Legislature and whether—what is the [illegible] the Court determines that this is an unreasonable and essential requirement and what is the [illegible] with respect to the proceedings in man[illegible] Bill of Exceptions 24.)

[illegible] Common Pleas denied the writ of man[illegible] opinion (Appendix, pp. 15-16). Appellant's [illegible] were raised again on appeal as assign[illegible] Section Eight, the Court of Appeals af[illegible] Common Pleas without opinion.

[illegible] was duly taken to the Ohio Supreme [illegible] for Appellant on October 16, 1968 [illegible] Court's decision in *Williams v. Rhodes*,

U.S. , 21 L. ed. 2d 24 (1968), to the attention of that court. Nevertheless, on October 23, 1968 the Ohio Supreme Court dismissed appellant's appeal *sua sponte* "for the reason that no substantial constitutional question exists herein".[3]

SUBSTANTIALITY OF THE FEDERAL CONSTITUTIONAL QUESTIONS INVOLVED.

A. There is a clear conflict between the decision of the three-judge federal district court in Socialist Labor Party v. Rhodes, 290 F. Supp. 983 (S.D. Ohio 1968), as affirmed and modified by this Court on October 15, 1968, sub nom. Williams v. Rhodes, U.S. , 21 L. Ed. 2d 24 and the decision below in the instant case.

Both majority and dissenting opinions of the three-judge district court in *Socialist Labor Party v. Rhodes*, *supra*, expressly adverted to the seven percent statute. Judge Kinneary wrote:

> "During the fifteen years period prior to 1947, participation in the electoral process by independently nominated candidates was neither substantial nor disruptive. Nevertheless in that year the Ohio General Assembly began a series of changes in the election laws which ultimately resulted in the complete elimination of independent and third party voters and candidates from Ohio's political arena."

The seven percent statute above all others drove non-Democrats and non-Republicans off the Ohio ballot. (Minor party candidates in the past had frequently quali-

[3] Appellant represented to the Courts that his name could be added to the ballot without in any way disrupting the electoral process, since printing of ballots in Cuyahoga County had been delayed. This claim was at no time questioned by any member of the Court.

fied as "independent" candidates because the Ohio laws deprived their parties of official status). After citing the sevenfold increase for political independents, Judge Kinneary concluded:

> "The express and unequivocal position taken by the courts is that any restriction on the right to vote must be closely scrutinized to insure that such restrictions are reasonable, non-discriminatory, and necessary. As evidenced both on the face of these statutes as well as in their operational effect, the restrictions imposed by the Ohio election laws do not meet these standards. The scheme of the Ohio legislature—to monopolize political power in the two major political parties—is plain * * *. *These restrictions on the availability of ballot position * * * are violative of the equal protection clause of the Fourteenth Amendment and are thus constitutionally impermissible.*" (Emphasis added.)

On appeal to this Court, Mr. Justice Black, after commending Judge Kinneary's analysis, agreed that:

> "[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." 21 L. ed. 2d at 33.

But despite these holdings that Ohio's restrictive election laws are constitutionally impermissible and constitute an invidious discrimination, and despite the fact that the seven percent statute was among the laws condemned as violative of the First and Fourteenth Amendments, the Ohio Supreme Court saw no substantial constitutional questions involved, and refused to grant appellant any relief. The conflict in views between the federal and state courts mandates clarification and resolution by this Court.

B. If the seven percent statute is permitted to stand, independents will continue to be excluded from Ohio's electoral process.

Despite this Court's landmark decision in *Williams v. Rhodes, supra*, Ohio's electoral system will remain essentially the property of the major political parties if the seven percent statute is retained.[1] *Independents and third party candidates were almost completely eliminated from the Ohio ballot as the direct and proximate result of the seven percent statute.* The Ohio Supreme Court's order in the instant case portends the perpetuation of that politically exclusionary law. Thus a system will be maintained which "denies the 'disaffected' not only a choice of leadership but a choice on the issues as well." *Williams v. Rhodes, supra*, 21 L. ed. 2d at 32, 33.

C. This case offers the Court a valuable opportunity for formulating more specific guidelines in an area where the absence of guidelines has demonstrably resulted in the disfranchisement of minority political groupings.

The action of the Ohio Legislature in increasing the requirement for independent candidates to seven percent *—when there was virtually no one qualifying under the one percent standard!*—created an arbitrary and capricious classification palpably offensive to Equal Protection and First Amendment guarantees. The failure of the Ohio courts to so decide flows from their unwillingness to apply the criteria established by this Court for testing the constitutionality of intrusions into voting rights. *Wesberry*

[1] For example, an independent candidate for state governor would have to secure more than a quarter of a million valid signatures to qualify for the ballot. This is prohibitive. By contrast, New York requires 12,000 signatures; Wisconsin 3,000; Illinois 25,000; Pennsylvania and Michigan require [illegible] and [illegible] respectively.

v. Sanders, 376 U. S. 1 (1964); *Carrington v. Rash*, 380 U. S. 89 (1965); *Harper v. Virginia Bd. of Election*, 383 U. S. 663 (1966).

It is now clear that States must show *a compelling interest* to justify the imposition of classifications which burden the right to vote. *Yet the courts below never asked appellees—nor did appellees volunteer to explain—why the requirement for independents was so drastically raised.* The question is hardly irrelevant.

> "In every case, therefore, where legislative abridgment of the rights [of speech and press] is asserted, the courts should be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise *the substantiality of the reasons advanced* in support of the regulation of the free enjoyment of the rights." (Emphasis added.) *Schneider v. State*, 308 U. S. 147, 161 (1939).

Here there were no reasons advanced, *substantial or otherwise*, for imposing the harsher requirements for independents. Since "classifications which might invade or restrain" fundamental rights and liberties "must be closely scrutinized and carefully confined," *Harper v. Virginia Bd. of Election*, 383 U. S. 663 (1966), the seven percent statute should have been stricken and the one percent requirement which had served Ohio well for over 70 years reinstated.

Voiding of the seven percent law would have automatically reinstated the prior one percent requirement. *Von Hoffman v.*

(Continued on following page)

By allowing the writ now, this Court can further elaborate the guidelines it has been steadily developing and it can do so on the basis of a clear set of facts. Certainly this petitioner and the State of Ohio are entitled to know whether the provision attacked in this litigation comports with constitutional standards.

D. The issues posited by this case are peculiarly ripe for resolution now.

Certain of Ohio's election laws must soon be rewritten by its Legislature as a result of the Court's holding in *Williams v. Rhodes*, *supra*. If the Legislature concludes that the seven percent requirement is still viable, it may well erect its new election system on that kind of exclusionary foundation. This would herald a new wave of litigation and a reopening of all the questions just recently before this Court. Although forty-two states require third parties to obtain the signatures of only 1% or less of the electorate in order to appear on the ballot, Ohio may well continue with the repressive seven percent qualification for independents and apply that standard to third parties. If this is to be avoided, the propitious moment for decision is now.

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Quinn, 114 S. Ct. 804, 345 (1994); *Ritzi Elections for Franklin County v. State Ex Rel. Schneider*, 28 Ohio St. 2d 214, 101 N.E. 113 (1934); *In People ex rel. Hotchkiss v. Scholl*, 206 N.Y. 231, 99 N.E. 568 (1912), a case amazingly similar to the instant one, the New York Court of Appeals, after striking a statute imposing an unreasonably high requirement for independent candidates, issued a writ of mandamus, declaring:

> This Court had no power to prescribe the number of voters for independent nominations. But, having held that the statutes which require an excessive number of signatures to an independent candidate are unconstitutional and void, we must go back to the last law on the subject which, in our opinion, complies with the requirements of the Constitution. 99 N.E. at 573.

It is for this reason that this case should not be deemed moot. Although this Court is no longer able to give appellant the precise relief he seeks—ordering his name on the ballot for the November 5, 1968 election—the fundamental constitutional issues raised here remain undetermined. Thus the case differs from *Love v. Griffith*, 266 U. S. 32 (1924), where the court took pains to emphasize that the rule under constitutional attack was for a single election only, which election had passed. Here there is the continuity lacking in *Love*. The judgment of this Court is sought on the constitutionality of a statute which is still being enforced and which will surely give rise to renewed controversy, unless resolved now. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 309 (1897).

Where interests of a public character are involved under conditions that may immediately be repeated, thus giving the litigation a continuing character, the mere fact that the particular subject matter of the instant case has expired does not render the case moot. *Boggess v. Berry Corporation*, 233 F. 2d 389, 391 (9th C.A., 1956); *Meyers v. Jay Street Connecting Railroad*, 288 F. 2d 356, 359 (2nd C.A., 1961). Cf. *Carroll v. Commissioners of Princess Anne*, ____ U. S. ____, 21 L. ed. 2d 325 (November 19, 1968).

Election cases have frequently been considered on appeal though the immediate election has been held. 132 ALR 1185, 1190, with copious citations. A case closely in point is *Carroll v. Schneider*, 211 Ark. 538, 201 S.W. 2d 221 (1947). An independent candidate brought a mandamus action asking the Court to order his name to be placed on the ballot. The Arkansas Supreme Court, which considered the case after the election, said:

> "It is urged, however, that the case is now moot and should be dismissed for that reason. It is moot in the sense that we cannot now afford appellant petitioner any relief but it is not moot in the sense that it is important to decide a practical question of great public interest, which may arise in any future election." 201 S.W. 2d at 224.

A further consideration militating against a holding of mootness is the vital need for guidelines for Legislature and courts. See *Boise City Irr. & Land Co. v. Clark*, 131 F. 415, 419 (9th Cir., 1904); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769 (1952); *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372 (1944).

Having briefed and prepared their cases, the parties here should not be compelled to resort to new litigation and climb the appeal ladder again in order to get an ultimate judicial determination of their conflicting claims. Time limitations characteristically inhere in election cases and where substantial constitutional issues of public interest exist—and persist—which require an authoritative determination for the future guidance of public officers, the mootness doctrine should not be invoked.

CONCLUSION.

The strenuous effort to open the ballot—or reopen the ballot—to disfranchised Ohioans in the face of the worst election laws in the nation was greatly advanced by this Court's holding in *Williams v. Rhodes, supra*, particularly with the resounding endorsement there of the rights of third political parties—including smaller political parties—to share the ballot. Nevertheless—at least insofar as Ohio is concerned—that decision will not provide any relief if Ohio's seven percent statute is permitted to stand. Accordingly, the Court is respectfully urged to

grant this appeal and to unlock a channel of expression now shut off by unconstitutional legislation.

Respectfully submitted,

RALPH RUDD,
Counsel for Appellant.

JERRY GORDON,
BENJAMIN B. SHEERER,
Of Counsel.

APPENDIX.

MEMORANDUM OF OPINION OF THE COURT OF COMMON PLEAS.

(August 22, 1968.)

PERRY B. JACKSON, J.:

This cause, an action seeking the issuance of a writ of mandamus, came on for hearing August 8, 1968.

Relator, Paul M. Brockington, on February 19, 1968, filed nominating petitions for the office of congressman in Ohio's 21st congressional district, with the Cuyahoga County Board of Elections, a named respondent herein. Relator sought to be placed on the November, 1968 ballot as an independent candidate.

On June 26, 1968, the Board of Elections advised relator that his petitions contained 899 valid signatures, and that the number of valid signatures required to be placed on the ballot in the November, 1968, general election was 5,974. (See relator's exhibit X-1.) Relator requested a hearing with the Board of Elections, which was granted. Following said hearing, the Board of Elections affirmed its decision, finding relator's nominating petitions to be insufficient.

On July 10, 1968, relator filed his petition for a writ of mandamus with this court, asking that Ohio Revised Code § 3513.257, which prescribes the requirements of nominating petitions of independent candidates for the office of district representative to congress be held to be unconstitutional and that respondents be ordered to place relator's name on the ballot.

Ohio Revised Code § 3513.257, states in pertinent part:

"The nominating petition of an independent candidate for the office of representative to the general as-

sembly, senator of the general assembly, and district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district."

In an action in mandamus, the relator has the burden of establishing a clear right to the relief sought. He must not only establish that the act which he seeks to compel respondents to perform is one that they are constitutionally bound to perform by virtue of their offices, but also that he, the relator, has a clear right to have the duty enforced.

In the case of *State ex rel. Baker v. Hanefeld, et al.*, 134 Ohio St. 540 (1938), the Court stated that a relator

> "must establish a clear legal right to the extraordinary remedy." 134 Ohio St. 541.

Similarly, in the recent case of *State ex rel. Baines v. Parrino*, 174 Ohio St. 531 (1963), the Court stated

> "It is axiomatic that a clear legal right must be established before a writ of mandamus will issue." 174 Ohio St. 531.

The burden of establishing a clear legal right is on the relator, and if upon all of the evidence presented, relator's clear legal right is not established, the writ must be refused.

This Court finds that the relator has not established by the evidence, his legal right to have a writ of mandamus issue. Therefore, without passing on the merits of the legal issues raised by the respective parties, the Court is of the opinion that a writ of mandamus may not issue in this case.

Writ denied.

JOURNAL ENTRY OF THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT, CUYAHOGA COUNTY, OHIO.

Date: October 1, 1968.

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration and a full reading of the entire record, the court finds no error prejudicial to the appellant and finds that the relator-appellant has shown no legal right to the relief requested. Therefore, the judgment of the Common Pleas Court is affirmed and it is ordered that appellees recover of appellant their costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO.

(October 23, 1968.)

This cause here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and no motion to dismiss such appeal having been filed the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.